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02-CV-2016-900246.00

Judge: SARAH HICKS STEWART

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IN THE CIRCUIT COURT OF MOBILE COUNTY, ALABAMA

SUZANNE SCHWARTZ ET AL VS CITY OF MOBILE ET AL
02-CV-2016-900246.00

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C002 DAVIS CAROL ADAMS

C001 SCHWARTZ SUZANNE

C003 WAGNER HERB

RESPONSE TO MOTION TO DISMISS PURSUANT TO RULE 12(B)

[Filer: BURNS PETER FRANCIS]

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02-CV-2016-900246.00
CIRCUIT COURT OF
MOBILE COUNTY, ALABAMA
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IN THE CIRCUIT COURT OF MOBILE COUNTY, ALABAMA

SUZANNE SCHWARTZ,	*
CAROL ADAMS-DAVIS,	*
HERB WAGNER,	*
and SARAH BOHENSTIEHL	*
	*
Plaintiffs,	*
	*
	*
VS.	***CIVIL ACTION NO. 02-CV-2016-900246**
	*
	*
CITY OF MOBILE, MOBILE CITY	*
PLANNING COMMISSION,	*
MOBILE CITY COUNCIL and	*
COOPER MARINE &	*
TIMBERLANDS CORPORATION	*
Defendants.	

PLAINTIFFS' RESPONSE TO MOTIONS TO DISMISS

Come now the Plaintiffs in response to the pending Motions to Dismiss and show unto this Honorable Court that all of these motions and each ground thereof are due to be dismissed, with the exception of the Motion filed by the Mobile City Council. In support of this response Plaintiffs show unto this Honorable Court as follows:

Overview

As Your Honor is well aware, the question before the court in ruling on a motion to dismiss is whether the Plaintiffs can prove any set of facts that will entitle them to relief. In making that analysis, the Court is required to resolve all inferences in favor of the nonmoving party. Furthermore, the Court is required to accept the allegations of the

complaint as true. See e.g. *Newman v. Savas,* 878 So. 2d 1147 (Ala. 2003). Applying that standard, it is clear that all of the Motions to Dismiss are due to be denied with the exception of the Motion filed by the City Council[1].

The grounds asserted in the various Motions suffer from multiple, and many times shocking, defects. In several arguments, the cases the defendants rely upon contradict the relief they request. Other arguments ignore controlling Alabama law which, when considered, reveals the fallacy of the Defendants' position. Other defense arguments are clearly fact-based and inappropriate for resolution on a motion to dismiss.

In responding to the Defendants' Motions to Dismiss, Plaintiffs will ignore Cooper's self-aggrandizing, factually-questionable and largely irrelevant "Procedural History." Plaintiffs will address the legal arguments in the sequence they appear in Cooper's Motion.

1) Separation of Powers

Curiously, in their first argument, the Defendants mischaracterize the Plaintiffs' complaint and rely upon cases that contradict the relief they seek. They argue that this case is due to be dismissed based upon the doctrine of separation of powers. The Defendants rely upon media accounts of extrajudicial statements for the proposition that the Plaintiffs want a more progressive process for determining when industries that generate hazardous materials should be allowed to locate in densely populated areas. While that would be a laudable result of this litigation, the Motion to Dismiss is properly

[1] For simplicity counsel will refer to the Motions to Dismiss as, unless otherwise specified, referring to all of the pending motions with exception of the motion filed by the City Council.

judged based upon the allegations in the complaint. Those allegations do not call upon Your Honor to rewrite legislation. Instead, the complaint actually seeks a declaration that the statute vesting authority to decide zoning to the Mobile City Planning Commission exceeds the authority granted by § 11-52-70, is an unconstitutional delegation of legislative power, and the approval at issue was arbitrary and capricious.

Inexplicably, in support of their argument that the separation of powers doctrine precludes this court from ruling, the Defendants quote cases which hold that the judiciary has the authority to review municipal decisions. For instance, on pages 6-7 Cooper's brief states "The Alabama Supreme Court has been clear that "[j]udicial review of municipal decisions regarding zoning ordinances is severely limited." *HHB, LLC v. D&F, LLC*, 843 So. 2d 116, 120-21 (Ala. 2002). The Defendants repeat and elaborate on the scope of judicial review in their Argument V where the Defendants correctly state:

> Alabama courts apply an arbitrary and capricious standard when reviewing local zoning decisions. *Ex parte City of Fairhope & Bd. of Adjustments & Appeals of City Fairhope*, 739 So. 2d 35, 38 (Ala. 1999) ("The proper standard of review in cases based on an administrative agency's decision is whether that decision was arbitrary or capricious or was not made in compliance with applicable law.").

While the reason the Defendants argue that the case is due to be dismissed based upon separation of powers is perplexing, that the argument is due to be rejected is crystal clear.

2) Standing

A) Standing in Environmental Cases

Defendants next challenge the Plaintiffs' standing to bring this action. In so doing, they choose not to mention the line of Alabama cases that address standing when

environmental protection is at issue. The only relevant environmental standing case the defendants rely upon is the Eleventh Circuit's decision in *Save Our Dunes v. Alabama Dept. of Environmental Management*, 834 2d 984 (11th Cir. 1987). The Defendants cite *Save Our Dunes* several times primarily to support the very high standing bar they say the Plaintiffs must clear. For instance, Cooper says on page 9

> "Aesthetic, environmental, or recreational concerns alone are not sufficient; there must be an adverse effect on his or her interest in the land. Save Our Dunes, 834 F. 2d at 988. Each plaintiff must have an immediate, pecuniary, and substantial interest in the litigation. Id."

Amazingly, the defendants fail to mention *Ex parte Fowl River Protective Ass'n*, 572 So. 2d 446 Fn. 3 (Ala. 1990) where our Supreme Court explicitly repudiated the Eleventh Circuit's holding in *Save Our Dunes* and categorically declared that it is not the law of Alabama.

> In *Save Our Dunes v. Alabama Dept. of Environmental Management*, 834 F.2d 984 (11th Cir. 1987), the court held that a person is not "aggrieved" so as to have standing to appeal an ADEM permit decision unless that person can show that the ADEM decision "adversely affected their legal or equitable interests in land." 834 F.2d at 989. Basically, the Eleventh Circuit ruled that a person cannot challenge an ADEM decision unless that person owns a property interest directly affected by the decision. **This is simply not the law in Alabama**. In cases involving appeals from ADEM decisions and in other cases, this Court has allowed "aggrieved" persons standing to appeal despite the fact that they did not own property affected by the decision in question. See *Ex parte Baldwin County Comm'n*, 526 So. 2d 564 (Ala. 1988), and *Johnson v. Rice*, 551 So. 2d 940 (Ala. 1989). It is not necessary in this case to delineate exactly who is, and who is not, an "aggrieved" person, because the parties that appealed this ADEM decision clearly qualify under the statute. We only wish to point out **that matters of environmental protection and regulation are of great significance to the citizens of Alabama, and that a citizen's statutory right to appeal an ADEM decision should be interpreted broadly**. Indeed, the Eleventh Circuit's decision in *Save our Dunes* is curious in light of the broad interpretation placed on citizen standing provisions in federal environmental statutes. See *Sierra Club v. Morton*, 405 U.S. 727, 92 S. Ct. 1361, 31 L. Ed. 2d 636 (1972). *Morton* certainly does not require that a person own a

> property interest affected by an administrative decision in order to appeal that decision. See also *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 98 S. Ct. 2620, 57 L. Ed. 2d 595 (1978). (Emphasis added)

By ignoring the holding in *Fowl River*, the Defendants are able to argue that only people who live adjacent to Cooper have standing to object to coal dust polluting the air, land and water of our community. Given Cooper's natural desire to maximize profits, attempting to limit scrutiny through such means is understandable, though certainly not commendable. However, why our City leaders would choose to join in an effort to preclude a decision on the merits is inexplicable. If it turns out that Cooper's coal dust is poisoning our people, animals, plants, air and water, properly motivated City leaders would want that destructive conduct abated, even if doing so required judicial intervention. Fortunately, the law of Alabama allows residents to protect themselves and the community from being poisoned even if they have to fight city hall to do so.

In another environmental case that the Defendants neglected to mention, *Black Warrior Riverkeeper, Inc. v. E. Walker County Sewer Auth.*, 979 So. 2d 69, 75-76 (Ala. Civ. App. 2007), the Alabama Court of Civil Appeals reversed the trial judge and discussed the multifaceted impacts of a healthy environment on the quality of life and the broad right of citizens to use the judicial system to protect against pollution.

> In *Sierra Club*, the United States Supreme Court held that an environmental organization did not have standing to seek declaratory and injunctive relief based upon allegations that certain aspects of a proposed development in a national park were barred by federal laws and regulations governing the preservation of such national parks in the absence of an allegation that organization's members 'would be affected in any of their activities or pastimes.' 405 U.S. at 735. In reaching that holding, however, the Court noted that the injury alleged by the environmental organization would be 'incurred entirely by reason of the change in the uses to which [the park] will be put, and the attendant change in the aesthetics and

> ecology of the area,' stating that it had been alleged that the proposed development "'would destroy or otherwise adversely affect the scenery, natural and historic objects and wildlife of the park and would impair the enjoyment of the park for future generations.'" 405 U.S. at 734. Notably, the Court did not question that such alleged harm "may amount to an 'injury in fact' sufficient to lay the basis for standing," adding that '[a]esthetic and environmental well-being' were 'important ingredients of the quality of life in our society, and the fact that particular environmental interests are shared by the many rather than the few does not make them less deserving of legal protection through the judicial process.' Id. Finally, the Court noted the prevailing trend toward 'broadening the categories of injury that may be alleged in support of standing' to include claimed injuries to """aesthetic, conservational, and recreational" as well as economic values.'" 405 U.S. at 738 (quoting *Association of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 154, 90 S. Ct. 827, 25 L. Ed. 2d 184 (1970)).

The amended complaint alleges that each of the plaintiffs is an aggrieved party and specifies the ways in which the plaintiffs have been damaged by the City's approval of Cooper's coal handling permit[2]. The complaint alleges that:

> 5. Suzanne Schwartz is an aggrieved person as a result of Cooper's approved land use. She is an adult resident of the City of Mobile and owns property in the City limits of Mobile that is affected by the grant of the application made the basis of this suit. Cooper's approved land use would, or could, have an adverse effect on the use, enjoyment and value of her land. She appealed the approval of the decision of the Planning Commission to the City Council.

[2] Rarely does a litigant belie a Motion to Dismiss by asserting facts that do not appear of record and are supported by allegations "based upon information and belief" as the Defendants did here. Even more rarely is the situation where, as here, the "information and belief" is demonstrably wrong as it is with Ms. Bohenstiehl who resides in and is president of the Property Owners Association of De Tonti. Contrary to the Defendants allegation, she lives very near Cooper.

6. Carol Adams-Davis is an aggrieved person as a result of Cooper's approved land use. She is an adult resident of the City of Mobile and owns property in the City limits of Mobile that is affected by the grant of the application made the basis of this suit. Cooper's approved land use would, or could, have an adverse effect on the use, enjoyment and value of her land. She appealed the approval of the decision of the Planning Commission to the City Council.

7. Herb Wagner is an aggrieved person as a result of Cooper's approved land use. He is an adult resident of the City of Mobile and owns property in the City limits of Mobile that is affected by the grant of the application made the basis of this suit. Cooper's approved land use would, or could, have an adverse effect on the use, enjoyment and value of his land.

9. Sarah Bohnenstiehl is an aggrieved person as a result of Cooper's approved land use. She is an adult resident of the City of Mobile. She works in downtown Mobile and lives in property she rents in the City limits of Mobile that is affected by the grant of the application made the basis of this suit. Cooper's approved land use would, or could, have an adverse effect on the use, enjoyment and value of her leasehold.

These averments are sufficient to allege that the plaintiffs are aggrieved by the City's decision to allow Cooper to release coal dust into the environment and upon the

people, animals and plants in the Mobile Community. Consequently, the Motions to Dismiss on this ground are due to be denied.

B) Standing & Failure to Appeal

Defendants' pattern of ignoring controlling precedent continues as they assert that Herb Wagner and Sarah Bohenstiehl lack standing to challenge Cooper's right to freely release coal dust all over downtown Mobile because they did not appeal the Planning Commission decision to the City Council. The Defendants claim that individuals who did not appeal failed to exhaust their administrative remedies and are forever barred from judicial redress. They support this drastic restriction on environmental standing by citing a case in which a trailer park operator failed to appeal an adverse decision and therefore did not exhaust his administrative remedies *Cook v. City of Columbiana*, 961 So. 2d 835 (Ala. Civ. App. 2007).

Once again, the Defendants are simply wrong. The case before Your Honor does not present an exhaustion of remedies issue. The City Council denied the appeal, thus paving the way for Cooper to operate a coal handling facility in downtown Mobile. The only remedy is a court action. The question is whether residents who, for whatever reason, did not appeal the Planning Commission decision forever forfeited their rights to seek judicial assistance in protecting themselves and their property from Cooper's coal dust. Fortunately, the law of Alabama does not limit aggrieved party status to those who were party to the appeal. In *Ex parte City of Huntsville*, 684 So. 2d 123, 124 (Ala. 1996) the court stated:

> In Cox, [Cox v. Poer, 45 Ala. App. 295, 229 So. 2d 797 (1969)] the court held that a "party aggrieved" includes a person, whose property is in proximity to the rezoned property, who can prove the current or potential adverse effect the changed status of the rezoned property has on the use, enjoyment, and value of his or her property, **regardless of whether that person was a party before the zoning board whose decision is appealed**. (Emphasis added)

Only by ignoring controlling precedent can the Defendants argue that the Plaintiffs lack standing to protect themselves and the community from the multiple toxic consequences resulting from exposure to Cooper's fugitive coal dust. When the relevant cases are considered, it is clear that all of the Plaintiffs have a right to be heard on this issue. Therefore the Defendants' Motions to Dismiss based upon standing are due to be denied.

3) Injunctive Relief

Plaintiffs allege that Cooper is operating illegally and that the City is granting permits illegally. Defendants argue that, even assuming Plaintiffs are able to prove those claims, injunctive relief is not available. There is a long line of cases holding that injunctive relief is appropriate to prevent ongoing or continuous damage to land. For example, in *York v. McAlpin*, 232 Ala. 158, 159 (Ala. 1936) the Alabama Supreme Court stated:

> The many authorities from this and other jurisdictions are collected in 32 A. L. R. 465, to the effect that there being no question of disputed title, or at least that equitable relief is not barred on that ground, injunction is a proper remedy to restrain repeated or continuing trespasses where the remedy at law is inadequate because of the nature of the injury, or because of the necessity of multiplicity of actions to obtain redress. Some of our decisions are: *Mobile County et al. v. Knapp*, 200 Ala. 114, 75 So. 881; *Woodstock Operating Corporation v. Quinn*, 201 Ala. 681, 79 So. 253; *Camp v. Conner et al.*, 205 Ala. 468, 88 So. 578; *Caples et al. v. Young et al.*,206 Ala.282 ,89So. 460.

The prism of reality demonstrates how ludicrous the Defendants' argument actually is. Defendants contend that if Your Honor determines that the City's process and Cooper's permit are illegal you lack the power to tell them to stop. The Plaintiffs are entitled to more than an advisory opinion. If Plaintiffs prove the allegations of their complaint, they are entitled to have their rights enforced.

4) Illegal Delegation of Legislative Authority

A) Zoning Approval Delegated to Planning Commission

The state legislature, in Alabama Code Section 11-52-70, delegated zoning authority to the City Council – not to the City Planning Commission. That section provides:

> Each municipal corporation in the State of Alabama may divide the territory within its corporate limits into business, industrial and residential zones or districts and may provide the kind, character and use of structures and improvements that may be erected or made within the several zones or districts established and may, from time to time, rearrange or alter the boundaries of such zones or districts and may also adopt such ordinances as necessary to carry into effect and make effective the provisions of this article.

The annotations to that code section clearly establish that the City Planning Commission is advisory only.

> Authority of planning commission.
>
> City, within the context of its zoning ordinance and within the limits imposed by the Code of Alabama, has the ultimate authority to rezone, and **the planning commission, in consideration of a rezoning amendment, is an advisory body only**. The planning commission can recommend to the city what it thinks should be done, but **it cannot pass finally on an application to rezone**. The city is not bound by a recommendation of the planning commission. *Mobile v. Karagan*, 476 So. 2d 60, 1985 Ala. LEXIS 4073 (Ala. 1985). (Emphasis added)

The Alabama Supreme Court has held that where a board derives its powers directly from the state legislature, such powers cannot be circumscribed, altered, or extended by the municipal governing body. *Swann* v. *Bd. Of Zoning Adjustment of Jefferson,* 459 So. 2d 896 (Ala. Civ. App. 1984); *Nelson* v. *Donaldson,* 255 Ala. 76, 50 So. 2d 244 (1951); *Water Works Board of the City of Birmingham* v. *Stephens,* 262 Ala. 203, 78 So. 2d 267 (1955)

That rule, standing alone, demonstrates that the City's attempt to expand the City Planning Commission's authority by giving it the power to approve or reject a permit is illegal. However, the seminal case dealing with the power of a city planning commission, *City of Mobile v. Karagan*, 476 So. 2d 60, (Ala. 1985) so clearly defines the role of the Mobile City Planning Commission that review of *Karagan* and its progeny may help the City avoid similar mistakes in the future.

In 1985, when *Karagan* was decided, Mobile's City Ordinance properly restricted the role of the Mobile City Planning Commission to that of an advisory body only. The City Planning Commission had no power to approve or reject permits. The relevant code section provided:

> "Following the public hearing, the Commission shall prepare a record of its proceedings in each case. The record of the proceedings shall be filed in the office of the Commission and shall be a public record; a certified copy of the record, **together with the Planning Commission's recommendation** and the grounds therefor, shall be transmitted to the [City] for further action." (Emphasis added)

In *Karagan* the Alabama Supreme Court upheld the Mobile City Council's action, specifically because the City Planning Commission was advisory only. The Alabama Supreme Court stated:

> The Mobile Zoning Ordinance, which was enacted in accordance with the provisions of the Code, specifically provides that the Planning Commission shall make recommendations on proposed amendments and transmit its recommendations to the City for 'further action.' Section IX-B-6 of the zoning ordinance, which is entitled Legislative Disposition, specifies the 'further action' the City might take. Consequently, the City, within the context of the zoning ordinance and within the limits imposed by the Code, has the ultimate authority to rezone, and the Planning Commission, in consideration of a rezoning amendment, is an advisory body only. The Planning Commission can recommend to the City what it thinks should be done, but it cannot pass finally on an application to rezone. The City is not bound by a recommendation of the Planning Commission. (*Id*. at 62-63)

Karagan was followed by other decisions which together establish a consistent line of cases which confirm that City Planning Commissions are advisory only. For instance, in *Calhoun v*. *Mayo*, 553 So. 2d 51, 52 (Ala. 1989) the Supreme Court stated:

> The planning commission is an advisory body and as such can only make recommendations to the Council, and it does not have the power to pass finally on an application to rezone. Its recommendations are not binding on the Council. The recommendations of the planning commission are only factors to be considered by the Council. *City of Mobile v*. *Karagan*, 476 So.2d 60, 62, 63 (Ala. 1985). Whether to change the zoning classification is a matter left to the legislative discretion of the municipal authorities. See *Episcopal Foundation of Jefferson County v*. *Williams*, 281 Ala. 363, 202 So.2d 726 (1967).

By the year 2012 the rule was so firmly established that it was no longer a point of contention. The Court recognized in *Gibbons v*. *Town of Vincent*, 124 So. 3d 723, 732 (Ala. 2012) that the parties had appropriately agreed that the City Planning Commission was an advisory body only:

> Consistent with our precedent, the parties agree that a planning commission can act only as an advisory body. In *Peebles v. Mooresville Town Council*, 985 So. 2d 388 (Ala. 2007), this Court held that, pursuant to the zoning statutes, a planning commission is an advisory body and cannot be vested with the power to rezone property: "'Under § 11-52-76, Ala. Code 1975, the zoning power delegated to every municipality ultimately rests with the legislative body of that municipality, i.e., the city or town council -- not the zoning commission or the municipal planning commission. See § 11-52-76, Ala. Code 1975 ' … A municipality is required to organize neither a zoning commission nor a municipal planning commission before enacting a comprehensive zoning ordinance. Both such commissions are optional and, even if created, are strictly advisory. See, e.g., *Rose v. City of Andalusia*, 249 Ala. 333, 335, 31 So. 2d 66, 66 (1947) ('It is not mandatory that a zoning commission be appointed, although such a commission may be designated ....'); and *City of Mobile v. Karagan*, 476 So. 2d 60, 62-63 (Ala. 1985) ('[T]he City [of Mobile], within the context of the zoning ordinance and within the limits imposed by the Code, has the ultimate authority to rezone, and the Planning Commission, in consideration of a rezoning amendment, is an advisory body only. The Planning Commission can recommend to the City what it thinks should be done, but it cannot pass finally on an application to rezone. The City is not bound by a recommendation of the Planning Commission.')."*Peebles*, 985 So. 2d at 397.

Post *Karagan*, Mobile amended the zoning ordinance and changed the role of the Planning Commission from an advisory body to a legislative entity. The current version of City Code § 64-8(B)(2)(c) provides in pertinent part:

> Applications for planning approval.
> The department shall receive all applications for planning approval where such approval is required for a permitted use. Within thirty (30) days after the receipt of such application by the department, the director of urban development, or his agent, shall refer the application, together with his report, to the planning commission for its consideration and action. At its next regular meeting, but in any event within forty-five (45) days of the filing of an application for planning approval with the department**, the planning commission shall** consider such application and **approve or disapprove** the application;… Should any person be aggrieved by the **decision of the planning commission** on the application for planning approval, such person **may appeal** such decision by filing written notice… (Emphasis added)

That change puts the Municipal Code in clear violation of *Karagan,* its progeny and the enabling legislation. Defendants do not attempt to distinguish *Karagan*.

Instead of addressing *Karagan,* and the change in the zoning ordinance, the Defendants base their arguments upon cases in which the state delegated authority directly to the agency involved. *Washington Park* and *Bailey* are emblematic of the irrelevant authority the Defendants rely upon. Neither case involves a city attempting to re-delegate legislative authority. In both cases, the state legislature delegated authority to the entity that made the decision at issue. In *Greater Wash. Park Neighborhood Ass'n v. Bd. of Adjustment of Montgomery*, 24 So. 3d 443, 445-446 (Ala. Civ. App. 2009) the entity was the Board of Adjustment:

> A discussion of the powers of the Board illustrates that the Association seems to misunderstand the Board's function."[T]he board of zoning adjustment sits as an administrative body performing a quasi-judicial function. [*Nelson v. Donaldson*, [*446] 255 Ala. 76, 50 So. 2d 244 (1951)]. Accord, *Ball v. Jones*, 272 Ala. 305, 132 So. 2d 120 (1961). And, **since the board of adjustment derives its powers directly from the state legislature, such powers cannot be circumscribed, altered, or extended by the municipal governing body**. Nelson v. Donaldson, 255 Ala. 76, 50 So. 2d 244 (1951). Accord, Water Works Board v. Stephens, 262 Ala. 203, 78 So. 2d 267 (195[5])."Swann v. Board of Zoning Adjustment of Jefferson County, 459 So. 2d 896, 899 (Ala. Civ. App. 1984). (Emphasis added)

Similarly, *Bailey v. Shelby County*, 507 So. 2d 438 (Ala. 1987), addressed a direct delegation of authority from the legislature to the Shelby County Planning Commission – not a re-delegation by the city council – and the court distinguished the facts before it from those in *Karagan* on that very point:

> The only other delegations of zoning power by the legislature which have come to our attention are to municipal corporations, Code 1975, § 11-52-70 et seq., and to Jefferson County, see, e.g., 1947 Ala. Acts 344. These

> delegations are to the elected governing bodies of the local political subdivision. We note especially *City of Mobile v. Karagan*, 476 So. 2d 60 (Ala. 1985), which turned on the fact that the Mobile City Planning Commission was an advisory body only, with the City of Mobile having final authority to rezone.

In summary, the law of Alabama is clearly set out in *Karagan* and its progeny. City Planning Commissions are advisory bodies only. The attempt by the City of Mobile to vest legislative authority in unelected volunteers is an unconstitutional delegation of the City's legislative authority, and is a violation of the authority granted by Alabama Code section 11-52-70. Accordingly, section 64-12(1)(b) and 64-8(b)(2)(c) must be stricken.

B) There Are No Applicable Standards

Because it is illegal for the City Council to shift its responsibility to the Planning Commission, there are few cases which address the standards and safeguards that are necessary to preclude the unfettered discretion at issue here. One case, however, is instructive—Shades Mountain Plaza LLC v City of Hoover, 886 So2d 829 (Ala. Civ. App. 829) In that case, a property owner challenged the City of Hoover's zoning ordinance which had created a form of discretionary review called a "conditional use permit." Id. at 831. Specifically, the ordinance provided that "requests for conditional uses as stipulated within the zone district regulations . . . are permitted only after review by the planning and zoning commission and approval of the city council." Id. at 834 (emphasis added) *quoting* Article III of the Hoover zoning ordinance.

In this case, Mobile has also created a species of discretionary review called "planning approval," but unlike the *City of Hoover*, the discretionary review set out in

section 65-12 of Mobile's zoning code gives the planning commission final authority, subject only to an appeal provided in section 64-8(B)(2)(c):

> Should any person be aggrieved by the decision of the planning commission on the application for planning approval, such person may appeal such decision by filing written notice with the department within fifteen (15) days from the date of the decision, after the filing of such notice of appeal, and the planning commission shall, within fifteen (15) days after the filing of such notice of appeal, send a transcript of the application and the applicable minutes and the record of the action taken by the planning commission to the city council who shall within fifteen (15) days after receipt of such transcript by the city clerk.

Planning Commissions have no authority to make final land use decisions under the state enabling acts, and the appeal procedure in section 64-8 does nothing to save it. When deciding appeals the Council, as it did in this case, simply decides whether to grant or deny the appeal. The Planning Commission has by that time exercised legislative authority just as Your Honor exercises judicial authority when you rule on a matter. That a party can appeal from that ruling does not deprive the ruling of its status as a judicial act.

We agree with the Defendants that *McClendon v. Shelby Co*., 484 So. 2d 459 (Ala. Civ. App. 1985), cert. denied (Ala. 1986) stands for the proposition that the legislature can grant administrative agencies quasi-judicial power where the legislature has established policies and standards, leaving the agency only to determine facts to which the legislative policy is then applied. Though the City of Mobile is forbidden from re-delegating the authority the legislature vested in it, if it did have such authority, the lack of policies and standards would render the delegation illegal.

The Minutes of the November 19, 2015 Planning Commission Meeting, attached to Cooper's motion as Exhibit A-3, reveal that the Planning Commission was advised of existing hazards and devastating risks associated with exposure to coal dust. In light of the known characteristics of coal and the potentially devastating impact fugitive coal dust can have on a metropolitan area - as evidenced for instance by the London coal fog of 1952 which killed 12,000 people - reasonable standards would have provided that the impact of the coal handling facility be investigated before the permit was approved.

The Defendants say appropriate standards were in place to allow for a reasonable decision, but just saying something does not make it so. The Defendants do not identify any specific standards or policies that are in effect and appropriate for consideration of a coal handling facility on the water and near a vibrant downtown. No policy required that the Planning Commission to:

- attempt to determine how much coal dust the Cooper facility would generate annually or,
- calculate where the resulting toxic plumes would travel or,
- investigate the carcinogenic impact the fugitive coal dust would have on residents or,
- estimate the contribution coal dust would have on the mercury and arsenic levels in the Mobile River or,
- address methods of minimizing the amount of coal dust that would escape from the facility.

The Mobile River is already classified as "impaired" by the EPA and ADEM. Those government entities have found that because of the mercury level, it is not safe to eat fish caught from the Mobile River. Had standards and policies been in place which required the Planning Commission[3] to consider the health of residents, the Planning Commission would have been required to determine the extent of the health risk before voting on the permit. Certainly reasonable standards would require that before allowing a carcinogens industry to locate on 1,600 feet of waterfront near a densely inhabited area, that the impact on the residents and environment be considered.

Clearly, reasonable standards would require that the Planning Commission estimate the harm and titrate its response. If the quantity of coal dust Cooper will release annually will shorten five lives a year, a less severe restriction on fugitive coal dust would be anticipated than if Cooper's emissions would shorten five hundred lives annually. Unfortunately the number of lives that will be shortened was not a consideration.

If reasonable policies and standards had been in place, certainly the Planning Commission would have attempted to fulfill its duty before voting on Cooper's application. There simply were no "policies and standards" for the Planning Commission to apply when faced with approval or rejection of an application with the potential of devastating the community.

[3] The Plaintiffs want to clearly announce that they are not disparaging the members of the Planning Commission in any way. They are volunteers who give freely of their time. They have nothing to do with the excessive authority the City has attempted to vest in them. Nor are they responsible for the City's failure to establish standards and procedures that would allow reasonable decisions to be made when a hazardous industry seeks permission to operate within the city limits.

C) Ex Parte Expansion of Capacity

The lack of standards is further apparent from the "Conversation regarding clarification" that members of the Planning Commission had on January 7, 2016. (Exhibit A-6 to Cooper's brief). The conversation occurred two days following the City Council affirmance of the Planning Commission approval. That discussion demonstrates that neither the Planning Commission nor the City Council had any idea how much coal they were authorizing Cooper to handle. Without knowing the quantity of coal Cooper would "through put", it is impossible to estimate the quantity of coal dust that would escape the facility.

The notes disclose that the conversation started with the question, whether the Planning Commission intended to limit capacity to the quantity of coal on site in 2015, or whether it was to limit capacity to the maximum amount that had been stored historically?

> Richard Olsen: Yes sir, Mr. Chairman, or Vice-Chairman, I do need to bring something up to ask for a point of clarification. Yesterday, excuse me, Tuesday, the City Council heard the appeal on the coal storage that was recently approved by the Commission, and there was a question as to whether one of the conditions that referenced the limited to the capacity of the site. The intent of the Commission: was that the capacity at the time of approval or the capacity, I think it was in 2010, that there had been, there's been a decrease almost every year, but it's been up and down. So, 2010 was the maximum that they had had. **Was your intent that capacity, the maximum capacity that they have had, or the capacity that was at the time of approval?** Roughly, at the time of approval it was 50,000 tons, no, 500,000 tons, and the 2010 was 1.5 million. (Emphasis added)

As will be seen, the answer became "None of the above." Honorable Doug Anderson Esq. informed the Planning Commission members in attendance that they were

"going to get an explanation on what your approval was – the intent behind your approval[4]." Honorable Steve Harvey, Esq. an attorney for Cooper, argued that Cooper should be allowed unrestricted through put. He and Mr. Anderson admitted that neither of them knew what the capacity of the Cooper site actually was. After some discussion, those in attendance - without a vote and without the matter having been on the agenda - reached a consensus that "through put" was unlimited and capacity was only restricted to the existing footprint, without regard to how high the coal could be piled. So, the answer that was "explained" to the Planning Commission members in attendance was that their intent was neither of the options set out by Mr. Olsen!

After having "explained" to the Planning Commission that their "intent" was to grant Cooper unlimited through put the notes demonstrate that the big winner in the "explanation" was Cooper:

> Mr. Anderson addressing Mr. Harvey, "Hey, you just won. You better leave. You just won. Thank you, Steve.
>
> Don Hemberee: Get out of here.
>
> Richard Olsen: Try to explain that to Bess.

This follow up discussion that substantially enlarged the amount of coal Cooper was allowed to handle – and thereby the amount of coal dust it would generate -

[4] This comment is telling on many levels. First, the topic was not on the agenda and those opposed to Cooper's permit did not have notice. Perhaps it is a coincidence that Cooper's attorney was present. Second, the topic was not raised by a Planning Commission member - none had expressed confusion about their intent. Third, Mr. Anderson did not say "We are going to determine the Planning Commission's intent" or words to that effect. Instead he and Mr. Harvey "explained" to the Planning Commission what their intent was. Reasonable procedures would require that those who decide whether a coal handling facility can locate within the city limits would be sufficiently informed that they would not have to be told after the fact what they intended.

demonstrates the absence of policies and standards that must be stated and applied when a legislative function is delegated to an administrative body. In summary, the code section which allowed the elected members of the City Council to shunt their responsibility for making decisions that dramatically affect the health and welfare of the community to the volunteers who serve on the Planning Commission is an unconstitutional delegation of legislative authority and due to be declared invalid.

5) Approve of Cooper's Application was Arbitrary and Capricious

The standard of review, even as stated by the Defendants and regardless of how it is worded, is undeniably factual because it is based upon whether there is "reasonable justification" or whether the question is "reasonably debatable." In none of the cases the Defendants rely upon did Plaintiffs' council find that a trial court granted a Motion to Dismiss.

Clearly, the facts before Your Honor could be found to raise a question of fact as to whether granting Cooper's application was arbitrary and capricious. Cooper's application was approved without any evidence of the quantity of coal being allowed, the amount of coal dust that would be created, the effect the coal dust would have on Mobile River or the Mobile Bay, the areas that would be inundated with coal dust or the impact that coal dust would have on the health of the people, plants and animals exposed to the coal dust.

After all of the evidence is presented, the Court may find that no reasonable person would make such a monumental decision without at least attempting to learn whether lives will be shortened, and if so, how many? Whether water quality will be

further impaired, and if so, how badly? Will property values be impacted and, if so, by what amount?

Approving this permit was worse than buying a "pig in a poke." The buyer of a pig in a poke knows the purchase price, but not the value of the item purchased. Here both sides of the equation are unknown. There is no evidence of the benefit the City is getting by allowing the coal handling facility. Nor is there and evidence of the cost our residents will incur in terms of health, property values or quality of life.

The Defendants' Motion to Dismiss the arbitrary and capricious count is due to be denied.

6) Redefining the Quantity of Coal Cooper Could Handle Denied Plaintiffs Due Process

The argument presented in section 4) B) above is incorporated by reference. The permit approval that was advertised and addressed in public meetings before the Planning Commission and City Council did not ask that Cooper be allowed to handle an unlimited quantity of coal. In its application for permit approval, Cooper disclosed the quantity of coal it had handled in the previous years. (Exhibit A-2 page 3 to Cooper's attachment). The minutes of the November 19, 2015 Planning Commission meeting reveal that Cooper's attorney minimized the quantity of coal Cooper handles. He told the Commission and the public, among other things, that "coal is only one product and only a fraction of the cargo handled at the facility." He went on to say that "This is NOT a coal terminal;" and that Cooper had

submitted "the volume of coal handled at the facility for each of the last six years." There is at least a question of fact as to whether the *post hoc* expansion of the quantity Cooper can handle was approved without due process of law.

7) Whether Cooper's Permit is Illegal is Properly Before the Court

It follows without elaboration that if the permit is determined to have been granted illegally, Cooper has no legal right to operate the coal handling facility.

Wherefore for the reasons cited above the Mobile City Council is due to dismissed and the remaining motions are due to be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have on this 16th day of November, 2016, electronically filed the foregoing with the Clerk of Court via electronic filing which will send electronic notification of each filing upon all counsel to these proceedings as follows:

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